No. 93-577

IN THE

Supreme Court of the United States

OCTOBER TERM 1993

ROBERT J. MAXWELL,

Petitioner,

v.

THE FIRST NATIONAL BANK OF MARYLAND, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Neither opposition to this petition disputes that the protective order issued below is based on an unprecedented extension of the state secrets privilege in that it bars the testimony of a private individual concerning information freely disclosed to him outside any confidential relationship with the federal government and outside the discovery process. Nor do the oppositions offer any precedent of this Court or of any lower court supporting this extension or justifying it on First Amendment grounds.

1. The government relies entirely on state secrets cases that prevented disclosure of information that had never previously been revealed outside secured channels. Opp. at 9, 11-12; *see, e.g.*, Opp. at 9 (In *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (*per curiam*), and *Totten v. United States*, 92 U.S. 105 (1875), government agents

"sought to *reveal* information that they had pledged (expressly in *Snepp* and implicitly in *Totten*) to keep confidential") (emphasis added).

The harm that these cases sought to prevent was the *disclosure* of secret information. Thus, as the government stresses, the privilege "bars litigants from discovering or utilizing at trial information *the disclosure of which* would be contrary to national security," Opp. at 8 (emphasis added), and the government's interest is in "protecting [] the *secrecy* of information important to our national security," *id.* (*quoting Snepp*, 444 U.S. at 509 n.3) (emphasis added).

Here, petitioner is not seeking to discover or reveal undisclosed state secrets. Everything that he seeks to offer as evidence has already been disclosed to him with no strings attached by employees or agents of his former employer, respondent First National Bank of Maryland ("FNB"). He has further disclosed what he was told during his bank employment to the press, and he has even recited it in court pleadings, which respondents have never sought to have sealed. The protective order entered below can do nothing to avoid the harm that the state secrets privilege guards against -- disclosure -- because the disclosure occurred long ago. Accordingly, there is no relation whatever between the state secrets privilege on which respondents rely and the protective order preventing petitioner from offering at trial what was disclosed to him during his private bank employment.

Neither the government nor FNB has cited any cases that extend the state secrets privilege to bar the use at trial of information that has been freely disclosed to a private individual who had no consensual secrecy relationship with the federal government. The government even concedes that no past state secrets case involved a situation analogous to this one.

In contrast, petitioner has cited two decisions of this Court that support the proposition that the First Amendment

forbids judicial restrictions, such as the protective order issued below, on the dissemination of information lawfully obtained by individuals outside the courts' process. *Butterworth v. Smith*, 494 U.S. 624 (1990); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The government seeks to distinguish *Butterworth* because it involved public dissemination of such information, rather than its use in court. However, there is not the slightest hint in *Butterworth* that the result would have been any different had the reporter sought to testify in court about the subject matter of his grand jury testimony, rather than write about it in a newspaper.

Moreover, contrary to the government's protestations, Opp. at 11 n.5, *Seattle Times* "*can*" be read to mean that the First Amendment precludes the use of protective orders to prohibit trial use of information obtained outside the discovery process. After all, in upholding the protective order regarding the use of discovery materials, this Court took care to make clear that litigants "may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes." 467 U.S. at 33-34.

For these reasons, the protective order barring petitioner from offering his own testimony as to what he was told and what he did during his private bank employment not only is unprecedented, but it raises serious constitutional issues warranting this Court's review.

2. Respondents assert that petitioner's claims cannot be tried because of the state secrets privilege and that it would be unfair to let them go forward. That assertion is not presented in this petition and is, moreover, wrong.

First, the district court decided only that petitioner could not prove his claims under this protective order, which prevented petitioner from offering his own testimony concerning what he was told about Associated Traders Corporation ("ATC") and the CIA. It did not decide the

viability of petitioner's claims under a properly drawn protective order that would permit the introduction of evidence already in petitioner's possession. Accordingly, the entire discussion in the joint opposition filed by FNB and ATC is wide of the mark, particularly since the district court had previously held that petitioner's amended complaint, which was based on that evidence, stated valid claims. District Court Memorandum and Order (June 11, 1990); District Court Memorandum and Order (Oct. 22, 1990).

Second, FNB neither asserted any defenses that hinge on *new* disclosures of state secrets, nor explained how it would need to make such disclosures in cross-examining petitioner or rebutting his evidence. Nor are such disclosures inevitable, since most of petitioner's claims depend not on the truthfulness of what was conveyed to him, but rather on how a reasonable person would react to it. In any event, although the district court is fully equipped to impose any appropriate limitations on any trial proceedings, neither it nor the court of appeals has yet considered the issue in the context of a properly limited protective order. Thus, the question whether a trial could go forward under a narrowly drawn protection order is not before the Court.

Third, the government contends that "it would be unfair to allow petitioner to offer his own speculations at trial, while forbidding counsel for the Bank and ATC to cross-examine him or present rebuttal evidence on these issues." Opp. at 12. In support of this assertion, the government argues that barring petitioner's testimony "was an appropriate exercise of discretion by the district court in the circumstances of this case." Opp. at 12 (footnote omitted).

Neither of these assertions is remotely based on the decisions below. The court of appeals, the district court, and the Magistrate Judge never addressed the fairness of precluding petitioner's testimony. Nor did they exercise any discretion, as the government erroneously suggests. Instead, they decided that the state secrets privilege had been properly

invoked to cover even petitioner's own testimony. They never asked whether a narrower protective order would be unfair to FNB, let alone whether it would be more or less unfair to deny petitioner his day in court.

Indeed, the fairness balance decidedly favors permitting petitioner to offer his evidence and seek redress. With respect to petitioner's employment claims, FNB obtained significant financial benefits from the ATC account, which may have been enhanced by its secretive nature. In contrast, petitioner endured significant emotional and financial harm as a result of the disclosures made to him. Even if the ATC account had a CIA connection, that fact does not excuse the tortious conduct of the bank. Petitioner should be able to present his evidence, and FNB should bear the costs of any obstacles that it might encounter in presenting its own case, especially since those obstacles may be based on consensual contractual arrangements, and since there is no evidence that it has no remedies to pursue against other involved parties.

Regardless of how the fairness issues may be resolved with respect to the discharge claims, it could not possibly be unfair to respondents to try petitioner's claim under 42 U.S.C. § 1985 based on respondents' vigilante-like threats to deter petitioner from pursuing this litigation. The state secrets privilege was designed as a legal means of suppressing sensitive information precisely so that government officials do not need to act as vigilantes outside the law. It would turn the state secrets privilege on its head and be grossly unfair to petitioner to use the privilege to preclude petitioner from seeking redress for the misconduct alleged in the amended complaint.

Although petitioner believes that these fairness issues would be resolved in his favor, they have not yet been decided by the courts below. Thus, the only issue raised in this petition is whether petitioner may be barred from testifying about what happened to him in his bank employment and about threats made to him after that

employment ended. Only when that issue has been correctly resolved in petitioner's favor will it be appropriate for the lower courts to decide any fairness issues based on a fully developed record.

CONCLUSION

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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